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IDAHO TEST OATH.

ARGUMENT

DELIVERED IN THE

Supreme Court of Idaho Territory, Feb. 10, 1888,

BY

HON. RICHARD Z. JOHNSON,

IN THE CASES OF WILLIAM HEYWARD, APPELLANT, *vs.* HENRY BOLTON, *et al.*, RESPONDENTS, AND JAMES B. INNIS, APPELLANT, *vs.* SAME RESPONDENTS.

Appeals from Bear Lake County.

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Hon. Richard Z. Johnson, in opening the case for the appellants, said:

If your honors please: These appeals do not involve a mere question of property, of dollars and cents, they involve an important principle—a principle that is of interest to every American citizen. I appear to-day in defense of a principle that has been dear to this people from the colonial days, a principle that lies at the foundation of our institutions—the right of suffrage, and to what extent limits can be placed upon the right—how far a legislature can go in the disfranchisement of their constituency; and in a question involving such a principle as that, I may feel justified, almost, in taxing the patience of the court somewhat. I should not feel justified in occupying the time I may occupy if it were a mere question, as I have said, of dollars and cents, but involving a question which in this case is of interest, principally, to one class of our fellow citizens, it also involves the interests and liberties of a whole people.

These are actions for damages against the respondents, who were the judges of election at an election held in and for Paris precinct, in Bear Lake County, on the twentieth day of November, 1886, for the election of a county surveyor, for refusing to receive the votes of appellants.

In each case there was a demurrer to the complaint on the

ground that it did not state facts sufficient to constitute a cause of action.

These demurrers were sustained in the court below, the appellants declined to amend and a final judgment was entered in each case for the respondents.

From these judgments the present appeals are taken to this court.

There is but one question in each case and that is whether the appellants could be required to take the oath prescribed by the laws of the thirteenth session of the Legislative Assembly, page 110.

The complaint in each case alleges, and the demurrers admit, that the appellants had at the time they offered their respective votes, the necessary qualifications of sex, age, citizenship and residence, that they were not persons under guardianship, *non compos mentis*, or insane, and had not been convicted of treason, felony or bribery in this Territory, or in any other State or Territory in the Union, or elsewhere, that they were not bigamists or polygamists and did not cohabit with more than one woman.

In the first case the complaint further alleges, and the demurrer admits, that the appellant Heyward did not teach, advise, counsel or encourage, and had not taught, advised, counseled or encouraged any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage.

His complaint further alleges, and the demurrer admits, that upon his not being challenged the appellant Heyward offered to take and requested said respondents to administer to him an oath that he was a male citizen of the United States, over the age of twenty-one years; that he had actually resided in this Territory for four months then last past, and in said county of Bear Lake thirty days; that he was not a bigamist

or polygamist, and did not cohabit with more than one woman, and did not either publicly or privately or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy or any other crime defined by law, either as a religious duty or otherwise, and that he had not previously voted at said election.

The principal question in this case is whether the appellant Heyward could be compelled, in addition to the above, to take an oath that he was not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization.

In the second case the complaint alleges, and the demurrer admits, that upon his vote being challenged the appellant Innis offered to take and requested said respondents to administer to him an oath that he was a male citizen of the United States, over the age of twenty-one years; that he had actually resided in this Territory for four months then last past, and in said county of Bear Lake thirty days; that he was not a bigamist or polygamist, and did not cohabit with more than one woman, and that he had not previously voted at said election.

And the principal question in this case is whether the appellant Innis could be compelled, in addition to the above, to take an oath that he was not a member of any order, etc., as in the last case, and that he did not either publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise.

The first section of our election law then in force provided that:

"All male inhabitants over the age of twenty-one years, who are citizens of the United States, and have resided in the Territory four months, and in the county where they offer to vote thirty days, next preceding the day of election, shall be entitled to vote at any election for delegate to Congress and for senatorial, county and precinct officers." (Laws 13 Ses., 106.)

The second conclusively shows that the appellants had all these qualifications and were electors of the county and Territory; that they were not polygamists, bigamists, or persons cohabiting with more than one woman, and, in short, were not subject to any of the disqualifications imposed by the eighth section of the act of Congress of March 22, 1882, commonly known as the "Edmunds Act" (Laws 1 Ses. 47 Congress, p. 31); and being such electors they could not be required, upon their votes being challenged, to take the oath prescribed by Section 16 of said election law. That section provided and R. S. Sec. 571 still provides that upon an elector being challenged one of the judges shall declare to him the qualifications of an elector and if he declare himself duly qualified, and the challenge be not withdrawn, one of the judges shall then tender him the following oath: * * *

"1. That you are not a *member* of any order, organization or association, which teaches, advises, counsels or encourages its members, devotees or any other persons to commit the crime of bigamy or polygamy or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy or plural or *celestial marriage* as a *doctrinal rite* of such organization.

"2. That you do not, either publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law either as a religious duty or otherwise.

"3. That you regard the Constitution of the United States and the

laws thereof, and of this Territory as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization or association to the contrary notwithstanding."

These clauses of the oath were not intended to exclude those who are disfranchised by the eighth section of the Edmunds Act as polygamists or bigamists, for by another clause of the oath the elector is made to swear that he is not a bigamist or polygamist; and they make no reference to unlawful cohabitation, although that is one of the grounds of disfranchisement in the act of Congress. But they were intended and are calculated to establish and, if they can be maintained, they do establish a test, not of the practice of bigamy or polygamy, or of unlawful cohabitation; not alone that the elector does not teach, counsel, encourage, or advise others to enter into any of these forbidden relations; but a test of *membership* in any order or organization which *teaches its devotees* or which practices *plural or celestial marriage as a doctrinal rite.*

To come within the bar of this interdiction there need be no practice, teaching or encouragement of the prohibited sins by the members sought to be disfranchised, no act in defiance of the statute or relation inhibited by the law, human or divine. The elector must take the entire oath, must negative its uttermost clause or must submit to disfranchisement for what his church or any other organization of which he may be a member, may teach its devotees or practice as a doctrinal rite.

Davis v. McKeeley, 5 Nev., 373-74.

That oath taken together shows, the history of this legislation shows, and its practical operation at the polls shows, that however it is attempted to be disguised, the intent and purpose of the clause under consideration is to reach those that believe that bigamy and polygamy are morally right, though they neither practice, teach nor encourage either.

What is a *doctrinal rite;* what orders, organizations or associations have devotees? Webster defines a rite as:

"The act of performing divine or solemn service, as established by law, precept or custom; formal act of religion, or other solemn duty; a religious ceremony of usage."

And a devotee he defines as:

"One who is wholly devoted; especially one wholly given to religion; one who is superstitiously given to religious duties and ceremonies, a bigot."

Not a very admirable character, perhaps, according to your notions and mine; but as long as it is confined to belief, the bigotry of the most fanatical devotee, be he Christian, Jew, or Mohamedan, is protected from any inquisitorial test by Congress or its creature, the Territorial legislature. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Constitution, 1 Amendment.

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. *Religious freedom* is guaranteed everywhere throughout the United States, so far as Congressional interference is concerned."

Reynolds v. U. S., 98 U. S., 162.

This is religious freedom and not mere toleration that the Supreme Court tells us is guaranteed.

Tucker's Blackstone, book 2, Appendix, page 4 and note.

"This prohibition may be regarded as the most powerful cement of the federal government, or rather, the violation of it will prove the most powerful engine of separation. Those who prize the union of the States will never think of touching this article with unhallowed hands."

Ibid, book 1, Appendix, p. 297.

This guaranty of religious freedom which the Supreme Court tells us extends everywhere throughout the United States, so far as congressional interference is concerned, is as binding upon the Territorial legislatures, the creatures of Congress, as upon that body.

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereafter organized, as elsewhere within the United States."

R. S., U. S., Sec. 1891.
National Bank v. Yankton, 101 U. S., 133.
Territory v. Lee, 2 Mont., 132.
Treadway v. Schnauber, 1 Dakota, 228.

The Supreme Court has said:

"No one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof."

And after mentioning other limitations upon the power of Congress and showing they limit its powers in the Territory as well as elsewhere, the court further says:

"And if Congress itself cannot do this—if it is beyond the powers conferred upon the federal government—it will be admitted, we presume, that it would not authorize a Territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution."

Scott v. Sandford, 19 How., 450-51.

That the guarantees of the Constitution, by which our liberties are secured, do not extend to the Territories cannot be contended and such contention, if made, is answered by the fact that in Reynolds v. United States the Supreme Court makes the validity of the act of 1862 depend upon the question whether it violates these guarantees; and in Murphy v.

Ramsey (114 U. S.) makes the validity of the Edmunds Act of '82 depend upon whether it violates the very guarantees we assert in this case.

The Supreme Court, in the first of those cases, says:

"The word 'religion' is not defined in the Constitution; we must go elsewhere, therefore, to ascertain its meaning, and no where more appropriately, we think, than to the history of the times in the midst of which the provision was adopted, the precise point of the inquiry is, what is the religious freedom which has been guaranteed."

98 U. S. 162.

For an epitome of the colonial history which led to this Constitutional guarantee, see Ibid, 162, 163, 164.

At the pages cited the court say:

"Before the adoption of the Constitution attempts were made in some of the colonies and States to legislate, not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784 the House of Delegates of that State, having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill be published and distributed, and that the people be requested 'to signify their opinion respecting' the adoption of such a bill at the next session of assembly."

This brought out a determined oppostiion. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. (Semple's Virginia Baptists, Appendix.) At the next session the pro-

posed bill was not only defeated, but another "for establishing religious freedom," drafted by Mr. Jefferson (1 Jeff. Works, 45; 2 Howison's Hist. of Va., 298), passed. In the preamble of this act (12 Hening's Stat., 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough, for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order." In these two sentences is found the true destinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute, the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being absent as Minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations (1 Jeff. Works, 79). Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly at the first session of the first Congress the amendment now under consideration was proposed, with others, by Mr. Madison. It met the views of the advocates of religious freedom, and was

adopted. Mr. Jefferson, afterwards, in reply to an address to him by a committee of Danbury Baptist Association (8 Jeff. Works, 113), took occasion to say: "Believing with you, that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no laws respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to his natural rights, convinced he has no natural right in opposition to his social duties."

Coming as this does from the acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

In this extract the court refers to the preamble of the act drafted by Mr. Jefferson, "for establishing religious freedom; and the Supreme Court says that in this preamble religious freedom is defined;" let me therefore read Mr. Jefferson's draft of the entire preamble:

"Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested His supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and

meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord of both body and mind, yet chose not to propagate it by coercions on either, as it was in His almighty power to do, but to extend its influence on reason alone; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; * * * that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that, therefore, the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess to renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages which, in common with his fellow citizens, he has a natural right; * * * that the opinions of men are not the object of civil government, not under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill-tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being, of course, judge of that tendency will make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."

As to the history of this act, its great author in his autobiography, 1 Jefferson's Works, p. 45, says:

"The bill for estabishing religious freedom, the principle of which had, to a certain degree, been enacted before, I had drawn in all the latitude of reason and right. It still met with opposition; but, with some mutilation in the preamble, it was finally passed; and a singular proposition proved that its protection of opinion was universal. Where the preamble declares that coercion is a departure from the plan of the Holy Author of our religion, an amendment was proposed, by inserting the words 'Jesus Christ,' so that it should read, 'a departure from the plan of Jesus Christ, the Holy Author of our religion;' the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohamedan, the Hindoo and infidel of every denomination."

These are the words of a man, who the Supreme Court tells us is an authority; this is the intent and meaning of an act that the Supreme Court tells us defines religious freedom; and, upon such authority, may we not add, that nothing less than this is religious freedom.

As another matter of contemporaneous history, to which the Supreme Court tells us we must look for a definition of religious liberty, for a proper interpretation of this guaranty of the Constitution, we might refer to the debates of the several State conventions that ratified and adopted that instrument. The Supreme Court tells us that four of them "included in one form or another a declaration of religious freedom in the changes they desired to have made," and that "accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison," and that "it met the views of the advocates of religious freedom, and was adopted."

The same contemporaneous history tells us that many of the States, in dissolving their relations with the mother country, made similar provisions in the several constitutions; let me read some of them.

Article 38, Constitution of New York, 1777:

"And whereas we are required, by the benevolent principles of national liberty, not only to expel civil tyranny, but also to guard against the spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind; this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind."

Article 5, Bill of Rights, New Hampshire, 1784:

"Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason; and no subject

shall be hurt, molested or restrained in his person, liberty, or estate for worshiping God, in the manner and season most agreeable to the dictates of his own conscience or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace, or disturb others in their religious worship."

Article 11, Declaration of Rights, Pennsylvania, 1776:

"That all men have a natural and inalienable right to worship God Almighty according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and that no authority can or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."

Section 16, Virginia Bill of Rights, 1776:

"That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."

This article of the Bill of Rights of Virginia, like Mr. Jefferson's act "for establishing religious freedom," has a history that shows the attitude of Mr. Madison as distinctly as the other shows the convictions of Mr. Jefferson.

In the House of Delegates Col. George Mason offered the original draft of this article as follows:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and all men should therefore enjoy the fullest toleration in the exercise of religion, according to the dictates of con-

science, unpunished and unrestricted by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society."

This Mr. Madison proposed to amend by striking out all after the word "violence" and substituting:

"And therefore all men are equally entitled to the full and free exercise of religion, according to the dictates of conscience, and no man or class of men ought, on account of religion, to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless, under color of religion, the preservation of equal liberty and the existence of the State are manifestly endangered."

But the Church of England was the established church in Virginia at the time, and the words "peculiar emoluments or privileges" were objectionable to the friends of the establishment, and the guaranty of religious liberty was finally agreed to as above given.

Washington bore his testimony as to the character of the institutions they had fought and bled to establish, when, in announcing the treaty of peace to the army, he said:

"Happy, thrice happy, shall they be pronounced hereafter, who shall have contributed anything, who shall have performed even the meanest office in erecting this stupendous fabric and empire on the broad basis of independency, who shall have assisted in protecting the rights of human nature and establishing an asylum for the poor and oppressed of all nations and religions."

Not for the true religion, not for the religion of the majority, but an asylum for all nations and religions, said the Father of his Country.

By the word "religion" in the Constitution is not meant "Christianity" or the "Christian religion," or any other form or system of religion. Christianity is no part of the law of the land; all systems are equal before the law.

Board of Education v. Minor, 13 Am. Rep. 343-45.
Atty. Genl. v. Brow, 55 Am. Rep. 678-79.

As I close this part of my argument there are some points upon which I do not wish to be misunderstood—points that I do not controvert and the assertion of which is not an answer to anything for which I contend. It is not claimed here that this guaranty of the federal constitution is a limitation upon the powers of the States. "The first ten amendments," says Judge Cooley, "the purpose of which was to establish guarantees against the abuse of the powers which had been granted to the general government, were adopted in pursuance of recommendations by State conventions when giving assent to the Constitution."

Cooley's Principles of Const. Law, 200.

He continues: "The Constitution as originally adopted declared that no religious test shall ever be required as a qualification to any office or public trust under the United States." (Art vi. 3.) By amendment it was further provided that Congress shall make no law respecting an establishment of religion, or prohiting the free exercise thereof. Both these provisions, it will be seen, are limitations upon the power of Congress only. Neither the original Constitution nor any of the early amendments undertook to protect the religious liberty of the people of the United States against the action of their respective State governments."

Ibid, 205.

It is not claimed here to-day that the States may not require a test—may not require a religious test, if there is not a guaranty in the State constitution.

It is not denied here to-day that States have imposed tests of this nature.

The Constitution of New Hampshire down to the amendments of 1877, provided that no person should be eligible to the office of Governor unless he was of the Protestant religion; and any State might renew such a test at any time as to any State officer; but Congress could not impose such a qualifica-

tion. What we contend is that no authority derived directly or indirectly from or under the Constitution of the United States can impose a religious test. Again, we do not contend here to-day that the elective franchise is a natural right—that it cannot be confined to the married or to the single man; but we do say that neither Congress, nor any legislature deriving its powers from Congress, shall make any relgious test.

"Make whatever test you please. Exclude a man, if you like, for his political sentiments, or his moral conduct, for his wealth or his poverty, for his youth or his age; make war on him for the color of his hair, for the length of his legs or the shape of his nose, but let him alone about his religion; that is consecrated ground; that is a point on which the Constitution has refused to trust you with one particle of power; and wisely, too, for mortal men are not fit to be trusted with such power; they have never had it without abusing it."

(Judge Black in 1856.)

But, again, if Congress could impose this oath, the legislature of the Territory cannot impose it under the present state of congressional legislation.

Congress in our organic act—now Section 1860 of the Revised Statutes of the United States—conferred upon our Territorial legislature the power, subject to certain enumerated restrictions, of fixing the qualifications of voters and of holding office. Of course this grant, like all others in the organic act, was subject to the constitutional limitations and restrictions upon the granting power; and it is equally apparent that by the grant Congress did not and could not divest itself of the power, subject to the same restrictions.

The power to fix these qualifications remained for years a concurrent power of Congress and the Territorial Legislature—the power of the latter being limited by the Constitution and the enumerated restrictions in Section 1860, while the power of Congress was limited only by the constitutional restrictions. This concurrent power of Congress and the Terri-

torial legislature subsisting, Congress undertook to legislate upon the whole subject of the disfranchisements growing out of bigamy and polygamy and unlawful cohabitation—growing out of the Mormon question in the Territories, and by the eighth section of the act of March 22, 1882, commonly known as the Edmunds bill, declared who should be disfranchised and disqualified—not any member of any order or organization that teaches its devotees this or that doctrinal rite—not any person who, himself, either publicly or privately, teaches this or that—but every polygamist, bigamist, or person cohabiting with more than one woman.

This legislation shows that Congress never intended that disfranchisement or disqualification for this cause should go further. This is also shown by the proviso of the ninth section of the same act: "Provided, that said board of five persons shall not exclude any person, otherwise eligible to vote, from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polgamy."

It is true that the ninth section of the act applies only to Utah, the "board of five persons" upon whom this proviso was a check was only for Utah; but, from the history of the times and from this legislation itself, we must presume that if Congress would consent to a further disfranchisement or disqualification —would consent to a disqualification or disfranchisement for opinion or membership or teaching, in any Territory or other place within their exclusive jurisdiction, that place would be the Territory of Utah.

But how careful are they not to infringe these constitutional guarantees even in Utah, the home of this order or organization; and it was left for a Territorial legislature to trample these guarantees in the dust upon a question of political expediency or to measure them by the standard of their

own notions of what their fellow citizens should be permitted to believe.

Although Congress in this ninth section did not provide that this "board of five persons" should establish the qualifications of voters; although, as the Supreme Court of the United States has since decided, they gave that board no such power, yet upon the suggestion of Senator Brown that according to the definition of Webster, a polygamist might be one who maintains the lawfulness of polygamy, and that upon that definition men might be disfranchised for opinion or belief, the proviso of the ninth section was inserted to prevent the possibility of such a disfranchisement even in Utah. Of this proviso, the Supreme Court in Murphy and Ramsey (114 U. S. 36), after saying that it may be taken "as the announcement of a general principle to govern all officers concerned in the registration of voters or the conduct of elections," at page 40 say that it defines and limits the meaning of the words "bigamist" and "polygamist" throughout the statute. The language of the Supreme Court at the last named page is:

"The words 'bigamist and polygamist' evidently are not used in this statute in the sense of describing those who entertain the opinion that bigamy and polygamy ought to be tolerated as a practice, not inconsistent with the good order of society, the welfare of the race, and a true code of morality, if such there be, because, in the proviso in the ninth section of the act, it is expressly declared that no person shall be excluded from the polls or be denied his vote, on account of any opinion on the subject."

The debate in the Senate of the United States when this bill was under consideration shows that the friends of the measure, even its author, never supposed that disfranchisement or disqualification could, under the guaranty of the Constitution, go further.

In that debate Senator Brown, in answer to the instance of the Hindoo rite of suttee, in answer to the question whether he would object, on constitutional grounds, to a law in the

State of Georgia punishing the son who burned the widows of his father upon the funeral pile, said: "I would inflict penalties upon him for practicing it (this rite of suttee); but if he really believes it is right, I have no right to exclude him from holding office because he says he believes it."

To which Mr. Edmunds immediately replied: "So I say, so say we all."

Cong. Rec. Ses. 47 Cong., Vol. 13, Part 2, p. 1204.

That is they all agree—not that it is inexpedient—but that they have no right—that the Congress of the United States has no right to exclude him for his belief or because he says—teaches—what he believes.

Chief Justice Hays.—Do you understand from that remark of Judge Edmunds that he meant to say that they had not the power, or does he simply mean to say that it would not be right as a matter of policy?

Mr. Johnson.—I understand from the remark that they have not the power.

Chief Justice Hays.—That they lacked the constitutional power over the question?

Mr. Johnson.—Yes. I have got the Record here. If you have got the Edmunds Act before you I would like to call your attention to it.

Chief Justice Hays.—My inquiry is this: Section 5 of the Edmunds act reads: "That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first that he is or has been living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by Section 5352 of the Revised Statutes of the United States, or in the act of July 1st, 1862 entitled "An act to punish and prevent the practice of polyg-

amy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah; or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman." There it is based upon a matter of his belief. Now, that act has been confirmed by the decision of the Supreme Court of the United States. That section has undoubtedly been confirmed. The only query in my mind is, if a juryman is an officer of the court, does not that act seem to intimate that they had the power to expel him from holding the position of an officer of the court purely upon the ground of his belief? And if that is true, then was not the remark of Judge Edmunds seemingly contradictory to his action in bringing forward and advocating this measure, and was not the action of Congress in adopting it in conflict with his statement as to what their legal power was? You will pardon me for these queries. I will examine into this question. I am only speaking now as to what my views were some time ago. It struck me, after carefully reading the remarks of Judge Edmunds, whom we all hold in high respect, that he intended to say that as a matter of policy he would not do it, rather than to announce solemnly the opinion that they had no constitutional power to so act. I thought so from the language itself, and also from the decision of the Supreme Court of the United States in affirming it.

Mr. Johnson.—I did not have the advantage of hearing your honor's decision. I would have answered the queries you put in my written argument; but it seems to me that this fifth section of the Edmunds act has no bearing upon the question that I am discussing. You may call a juryman an officer of the court, if you please, an integral part of the machinery of the court for the administration of justice, but there is no right, there is nothing in our institutions that guarantees the

right to serve on a jury. As an attorney, in conducting a case, I ask a man who is summoned as a juryman what I could not ask him at the polls. I ask him what his belief, or prejudice, or opinion is, germane to the subject to be tried. There they ask, under the fifth section, and very properly ask, a man in regard to his opinion or his belief as to the issue to be tried. I think, however, that the right to serve as a juryman is a very different right; that it has nothing in its nature in common with the right of suffrage. I can exclude and do exclude, time after time, a juryman for his opinion. If I am trying a case in which the Free and Accepted Masons are a party, or a case in which they take a special interest, I examine the jurors, if any of them belong to that fraternity, as to their belief or interest in the controversy. I ask a juryman in every case if he has formed an opinion on the subject to be tried. This same question is discussed in the debates—the distinction between the fifth section and the other clauses of the bill—this right of a juryman and the rights of an elector are fully discussed in the debates. I have not the clauses marked, but the distinction is here, that it is in the nature of the language stated that where a freeman goes to the polls to cast his vote you cannot ask him his opinion in regard to matters of science, politics or religion; but you can in court ask a juryman whether he would be a fair and impartial juror upon the issue to be tried. Under this law when a man is to be tried for polygamy, bigamy or unlawful cohabitation, you can ask a man, to a certain extent, whether he is a member of an organization that teaches that, whether polygamy, bigamy, etc., is a part of his religion, or as I have heard it put before the court, whether he is a Mormon or not; but the right to serve on a jury is not the right of a juror. The jury box is the right of the party and not the juror. It seems to me there is no analogy between these cases, and it was so considered in the debate to which I have referred. As to what Judge Ed-

munds did say, I think a fair construction was put upon it by the Senator from Georgia. He said they had not the power, not that it was inexpedient, but that they had not the power. "So say I, so say we all." And this was not an expression in the heat of debate. If I had time to read column after column of the first debate, your honors would see that it is deliberate, and the same principle is enunciated in the subsequent debate.

[Mr. Johnson then read from the debates as reported in the Record.]

The court at this point took recess until 2 o'clock.

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2 o'clock p.m.

At the opening of the court at this hour,

Mr. Johnson said: In further reply to the queries of your honor, I will call your honor's attention, if the court please, to this section (5th) and the object of it. The section allows a challenge for belief on that subject (polygamy, etc.); it absolutely says that a juryman may be examined as to these things, which was probably the object of the section. It then goes on to say that he may decline to answer, etc. The section was not passed with a view of giving his belief on the subject, but of having formed an opinion as to the issue—that polygamy was right or wrong; because the rule in all other cases that implied bias disqualified a juror, which was in order before the passage of this act.

[Mr. Johnson then referred to the Miles case (103 U. S. Reports, pages 204-309) to show the ground of challenge, etc. He also continued to read from the debate; afterwards he continued the reading of his argument.]

No Senator intimated that anyone could be disfranchised or punished in any way for being a Hindoo and belonging to

an order which both teaches and practices the rite of suttee; all agreed that a man might believe this, and say that he believes it, and no one suggested that such belief becomes criminal because others believe it, or because it is the belief of an order to which he belongs; no grave Senator even hinted at the subterfuge that the test of such belief is any the less a religious test, within the meaning of the Constitution, because the belief is part of religion, or that of the devotees of an order, organization or association.

That is a wretched guaranty of religious liberty which, while it protects us in our individual opinion, withdraws that protection the moment we associate ourselves with our co-religionists and join an association that teaches our belief.

There is—there can be no such distinction; the one is as much a "prohibiting the free exercise of religion" as the other.

Additional confirmation that the construction we contend for is that put by the author of the Edmunds bill upon the guaranties of the Constitution, and that Congress purposely and advisedly omitted to extend this disqualification and disfranchisement to membership in any sect, may be found in the fact that in the supplementary Edmunds bill, reported by the same Senator at the last session of Congress and then known as Senate bill No. 10, and which resulted in what is now known as the Tucker-Edmunds bill—in that bill as reported (which was thought by many anti-Mormons to trample upon property rights and to strain more than one guaranty of the Constitution)—even that bill, which was many-sided and seemed to omit little in this distinction that a great constitutional lawyer would care to defend before his fellow-Senators and upon which its author seems to have brought to bear all his great abilities and profound learning—even this, while it omitted nothing else claimed to be constitutional and at the same time unpleasant for the Mormons, did not as reported or in any shape it assumed, and does not, as it stands upon the

statute books to-day, extend the disqualifications or disfranchisements of the eighth section of the original act so as to embrace membership or belief. In the debates upon it Senator Hoar thus challenged its learned author: "Why does not the honorable Senator from Vermont come out and say frankly that no *Mormon*, no man who *believes* in plural marriages, no Mormon elder, no teacher in that church shall be clothed with the suffrage?" To which Mr. Edmunds replied:

"Mr. President, my friend from Massachusetts inquired why I do not come out frankly and say that I want to deprive a Mormon of the right of voting because he believes in certain things that I believe to be criminal. I do come out frankly and say that I am not in favor of anything of the kind. This bill and the bill that preceded it and other bills that very likely will follow this until the practice of polygamy is extirpated and it is admitted to be a dead and gone thing, are not based upon the idea of in any manner interfering with the opinions and belief of anybody."

1 Ses. Cong., Cong. Rec. Vol. 17, part 1, p. 407.

Here Judge Edmunds tells us that the Edmunds bill, the Edmunds-Tucker bill and the measures that are to follow and extirpate polygamy are not intended in any manner to interfere with the opinions or belief of anybody. On a subsequent day to which the debate was adjourned, Mr. Edmunds, in explaining the provisions of the bill, said:

"These trustees have nothing to do with church government or discipline. They have no control over or influence upon any part of the faith or doctrine of the church, and we do that *upon the universally recognized principle that we would not undertake to interfere with anybody's faith or doctrine or worship.*"

Ibid, 560.

Mr. Edmunds calls this a "universally recognized principle"—he had never heard of the legislation I am contending against here to-day—"not to undertake to interfere with anybody's faith, or doctrine, or worship."

Shall I be told that you do not undertake to interfere with my worship when you disfranchise me for membership in the order, organization or sect that conducts that worship?

Most worships are conducted by organizations, sects, communities and gatherings together of its devotees or members. I know of no sect but that has some gathering, some membership connected with its worship. There is something that separates it from the outside world, and that is membership. Some part of the worship of every sect is a gathering together of its members; and can it be said that to interfere with this membership—to proscribe this membership, is not to interfere with its worship?

Again Mr. Edmunds said:

"No one of these trustees and assistant trustees now under the law, supposing it to be in force, has the slightest control or influence over any part of the operations of the church as a church as to matter of doctrine, and discipline, and worship, as it is understood among men."

Ibid.

Shall I be told that "as it is understood among men membership has nothing to do with the discipline and worship of a "church as a church?"

Speaking of the act of 1862, he said:

"It is perfectly plain to my mind that the Congress of the United States did not interfere with or intend to interfere with the existence of the Church of Jesus Christ of Latter-day Saints as a religious corporation for the purposes of worship and doctrine."

Ibid.

Again, speaking of the proposed trustees and all the time repudiating any right to interfere with the doctrine or worship of the church, he says:

"They are given no authority to do anything concerning the faith, worship, or doctrine of the church. Therefore when we interfere with that section regarding trustees, we do not interfere with anything that relates to anybody's religious belief of any kind, be it good or bad."

Ibid.

And so on, time and time again, throughout the debate, day after day, Mr. Edmunds iterates and reiterates the same doctrine.

We are safe in saying, then, that the Congress of the United States purposely and advisedly omitted—I might say refused to extend the eighth section of the act of 1882 to membership or belief. What Congress did enact is as follows:

"Sec. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such Territory or place, or under the United States."

And, as we said before, by this section Congress undertook to legislate upon the whole subject of the disfranchisements and disqualifications growing out of, or consequent upon bigamy and polygamy and unlawful cohabitation in the Territories.

And what was before under Section 1860, of the Revised Statutes of the United States, a concurrent power of Congress and the Territorial legislature upon this subject, subject, of course, to the guaranties of the Constitution, and in the legislature further subject to the restrictions in that section, was withdrawn from the Territorial legislature, by this action of Congress on the subject—this concurrent power, similar in its nature to the concurrent powers of Congress and the States upon many subjects, ceased. There are many powers that are given to Congress that are not given exclusively, and may be exercised by the States when Congress fails to act, as for instance, the regulation of the militia, the establishment of a

uniform system of port and pilot regulations, and other powers have been held from the first adoption of the Constitution to be concurrent.

Story on the Constitution, secs. 442-43.
Cooley on the Constitution, pp. 35, 74.

It is a axiom construction that when those powers are exercised by Congress, the concurrent power in the inferior legislature ceases or is in abeyance; that the two legislative wills cannot be exercised at the same time upon the same subject matter, and that of Congress, within its sphere is "the supreme law of the land."

Paschats Annotated Const. (3d ed.) Sec. 288.
Ex-parte McNiel, 13 Wall., 240.
Gilman v. Philadelphia, 3 Wall., 713, 727.
Pennsylvania v. Wheeling Bridge, 18 How., 430.

Railroad Company v. Fuller, 17 Wall., 568, says that one class of the powers of government, in the complex system of polity which exists in this country are "those which may be exercised by the States but only until Congress shall see fit to act upon the subject; the authority of the State then retires and lies in abeyance until the occasion for its exercise shall occur." And speaking of some of the cases above cited, at page 569, the court say:

"In Gilman v. Philadelphia, the State of Pennsylvania had authorized the erection of a bridge over the Schuylkill River in the city of Philadelphia. This court refused to interpose, because there was no legislation by Congress 'affecting the river.' The authority of Congress over the subject was affirmed in the strongest terms. 'In the Wheeling Bridge case, the bridge was decreed to be a nuisance, because Congress had regulated the Ohio River, and thereby secured to the public the free and unobstructed use of the same.' Congress subsequently legalized the bridge, and this court held the case to be thereby terminated."

"In Cooley v. The Board of Wardens, the validity of a State law establishing certain pilotage regulations, was drawn in question. It was admitted by this court that the regulations were regulations of commerce,

but it was held that they were valid and would continue to be so until superseded by the action of Congress. In ex-parte McNiel, the same question arose, and the doctrine of the preceding case was reaffirmed."

County of Mobile v. Kimball, 102 U. S., 609, at page 700, the court say of Gibbons v. Ogden:

"It determined that the grant of power by the Constitution accompanied by legislation under it, operated as an inhibition upon the States from interfering with the subject of that legislation."

Wisconsin v. Daluth, 96 U. S., 387.
Pound v. Turck, 95 U. S., 462-63.
Crandall v. Nevada, 6 Wall., 36, 43.

Then we say that Congress having legislated upon this subject—upon the disfranchisement or disability growing out of this relation, the power originally granted, if you please—if any such power ever was granted—ceased to be concurrent in the Territorial legislature—that the Territorial legislature cannot add to or create any other or additional disabilities growing out of the same question upon which Congress legislated in the eighth section of the Edmunds bill.

Chancellor Kent in speaking of the decision of the Supreme Court in the case of Houston v. Moore, says:

"The doctrine of the court was, that when Congress exercised their power upon any given subject, the State could not enter upon the same ground and provide for the same objects. The will of Congress may be discovered as well by what they have not declared, as by what they have expressed. The two distinct wills cannot at the same time be exercised, in relation to the subject, effectually, and at the same time be compatible with each other. If they correspond in every respect, then the latter is idle and inoperative. If they differ, they must, in the nature of things, oppose each other so far as they do differ. It was therefore, not a true and constitutional doctrine, that in cases where the State government has concurrent power of legislation with the national government, they may legislate upon any subject on which Congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other."

1 Kent's Com., 389.

At page 391 the chancellor says:

"The question was, whether a State legislature had any concurrent power remaining after Congress had provided, in its discretion, for the case. The conclusion was, that where once the legislature of the Union has exercised its power on a given subject, the State powers over that same subject, which had before been concurrent, was by that exercise prohibited; and this was the opinion of the court."

In the case referred to by Chancellor Kent, the Supreme Court say:

"The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared that the punishment for the disobedience of the act of Congress shall be a certain fine, if that provided by the State legislature for the same offense be a similar fine; with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed."

Houston v. Moore, 5 Wheaton, 22, 24.

The court continues in the same connection:

"This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the Constitution of the United States, the benefit of which he may lawfully claim."

Ibid, 23.

Again, at page 24 the court say:

"This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the State government have a concurrent power of legislation with the national government,

they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in operation, contradictory and repugnant to each other."

And at page 68, Mr. Justice Story, in a concurring opinion, asserts the same doctrine, and says that it would be a strange anomaly, if, because Congress had not exercised a power to its full extent, therefore the States might exercise it "by a sort of process of aid."

And in Prigg v. Pennsylvania, 16 Peters, 618, Mr. Justice Story, in speaking of a law of Congress, again says:

"Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of Houston v. Moore, 5 Wheat. 1, 21, 22, where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

In Holmes v. Jennison, 14 Peters 578, C. J. Taney says:

"In the language of the Supreme Court in the case of Houston v. Moore, 5 Wheat., 23, 'we are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual, and at the same time, compatible with one another.' "

In the Passenger cases, 7 How., 400, Mr. Justice McLean said:

"There is not a federal power which has been exerted in all its diversified means of operation, and yet it may have been exercised by Congress, influenced by a judicious policy and the instructions of the people."

As the eighth section of the Edmunds bill imposes disqualifications and disfranchisements in connection with this matter, the presumption necessarily and inevitably arises

either: first, that Congress considered that section sufficient and as far as the law could go; or, second, as far as the law could go under the Constitution, otherwise Congress was derelict in its duty.

They either considered this disfranchisement of men who were guilty of the overt act of unlawful cohabitation, or bigamy, or polygamy—as far as they could go, or they considered it sufficient, for it follows with the precision of a syllogism, that if they believed that more disfranchisement was necessary, proper and just, and that they had the constitutional power to inflict it, they were bound by the solemnity of their official oaths, when they were legislating upon the subject—when they were passing that eighth section, to add these clauses. Or if further events have shown the remedy then adopted to be insufficient and inadequate, and they believe that more is necessary and that they have the constitutional power to add these things that the legislature of Idaho has undertaken to add, then when they were legislating at the last session upon the Tucker-Edmunds bill—when they were discussing the whole matter—you must say that they were derelict in their duty that they did not add these provisions then.

But we have seen that they were not so unmindful of the obligations of their oaths, that they were not so derelict of their duty, as they understand it.

We have seen in the extract that I have read from that debate, that when the chairman of the judiciary committee of the United States Senate, the great author of these measures, who is himself an authority on constitutional questions, was challenged by the Senator from Massachusetts, and it was demanded of him why he did not come out frankly and say (what the legislature of Idaho has undertaken to say) "that no Mormons, no man who believes in plural marriages, no Mormon elder, no teacher in that church, shall be clothed with the suffrage?" Mr. Edmunds disclaimed any intention so to

say; disavowed any authority in Congress so to say; but he did say that neither the past legislation of Congress nor that which is to follow and extirpate polygamy from the Territories, is "based upon the idea of in any manner interfering with the opinions or belief of anybody." This omission, thus, from the legislation of Congress, was not an oversight, nor a wilful dereliction of duty.

And we are fully authorized to repeat here, what the Supreme Court has so frequently said in the cases that I have read to you, that in the execution of this power vested in Congress and in the Territorial legislature (granting for the purposes of the argument that it is vested in the legislature)—that in the execution of this concurrent power, the will of Congress is not to be thwarted or opposed by the subordinate legislature, and that will is to be discovered as well by what Congress has not declared—by what, in this case, Congress has, time and time again, expressly refused to declare—as by the words of the statute it has enacted.

And to that will, when so discovered—whether manifested in the exercise of an exclusive or of a current power—you and I—this Court and the Legislative Assembly—must all bow.

The acts of Congress applicable to the Territories are, under the Constitution, our paramount law, controlling the Territorial legislature as the constitution of a State controls its legislature; just as paramount over the Territorial legislature as the State constitution is over the State legislature.

A constitution is a fundamental law—a law that is binding upon the legislature; and when Congress legislates for us, its acts are our constitution, for it is beyond the power of our legislature to annul or modify them.

And when Congress defines the qualifications of electors in the Territories in any particular the qualifications or disqualifications thus prescribed are as conclusive upon our legislature as, if found in a State constitution, they would be upon

the State legislature. But, by familiar canons of construction, if the eighth section of the Edmunds bill was found in the constitution of a State, its legislature could not add other disqualifications to arise out of the same subject matter.

Judge Cooley says:

"Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases."

Cooley's Const. Lim., 64.

As where the Constitution authorized the legislature to exclude from the right of suffrage persons who had been or might be convicted of infamous crimes, the court say:

"It may admit of much doubt, whether the legislature are not restrained from excluding from the right of suffrage any other persons than such as have been, or may be, convicted of infamous crimes. The enumeration of offenses, in the conviction for which power is given to the legislature, to exclude the persons convicted, by necessary implication, denies the power in any other case."

Baker v. The People, 20 Johnson, 460.
McCrary on Elec. (5 ed.), Sec. 83.

Section 14 of Article 11 of the constitution of Missouri provided that: "The general assembly shall not authorize any county, city or town to become stockholders in, or to loan its credit to, any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Held that an act submitting the question of a subscription to a railroad to the qualified voters who were taxpayers was void; that the legislature could not add that qualification.

McCrary on Elections, (3d ed.), Sec. 16.
Clayton v. Harris, 7 Nev., 64.

We have said that it is not claimed then that the right of suffrage is a natural right. But we do say, in the language of the Supreme Court of Massachusetts, that the right of voting, in such a government as ours is a valuable right and cannot be infringed without producing an injury to the party.

Lincoln v. Hapgood, 11 Mass., 355.

And speaking of the same right, the Court of Appeals of New York said:

"It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges, which places him upon an equality with his neighbors. Any law which takes away or abridges their rights, or suspends their exercise, is not only an infringement on their enjoyment, but an actual punishment."

Green v. Shumway, 38 N. J., 421.

The elective franchise—the right of suffrage—is the highest privilege of citizenship.

Alexander Hamilton declares that:

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property. Such a doctrine would ill suit the principles of the revolution which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to share in the government. Let me caution against precedents which may in their consequences render our title to this great privilege precarious."

In Cummings v. Missouri, the court say:

"The deprivations of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending, and the cause of the deprivation determining this fact."

4 Wall, 320.

Judge Bouvier says:

"Punishments are either corporal or not corporal; punishments not corporal are fines, forfeitures, suspension, or deprivation of some political or civil right."

Mr. Webster, Dartmouth College case, says:

"It cannot be necessary to say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary benefit, as if the law regarded no rights but rights of money and visible, tangible property, of what nature are all rights of suffrage? No elector has a particular personal interest, but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him."

5 Webster's Works, 479.

In the Cummings case the court say of the Missouri constitution:

"This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath."

4 Wall, 327.

In Minors v. Happersett, 21 Wall., 176, the court says:

"The right of suffrage when granted will be protected. He who has it can only be deprived of it by due process of law."

By due process of law, but an expurgatory oath administered by judges of election is not due process of law.

The first section of the election law of 1885, laws 13 Ses., p. 106, says:

"All male inhabitants over the age of twenty-one years, who 'are citizens of the United States, and have resided in the Territory four months, and in the county where they offer to vote, thirty days, next preceding the day of election, shall be entitled to vote in any election for delegate to Congress, and for Territorial, county and precinct officers.' And the record shows that both of those appellants were qualified electors under this section. The oath they were required to take when challenged is not due process of law, and has nothing to do with their qualification."

Upon this subject Judge McCrary says:

"The object of prescribing an oath to be taken by an elector who is challenged at the polls, or before registering officers, is to test the right of such persons to vote or register. It is doubtful whether a statute requiring a challenged person to take an oath, the nature of which is such as not in any degree to test their right, would be held valid. It would probably be held to be not a proper regulation upon the exercise of his right to vote."

McCrary on Elec. (5 ed.), Sec. 21.

In Green v. Shumway, 38 N. J., 418, the Court of Appeals say that expurgatory oaths "have been regarded in all countries in modern times as odious and inquisitorial, and passed, as they usually are, in times of high excitement, upon the return of cool judgment and calm reason, have been condemned and repealed by legislative enactments. Such was the case in our own State, after the termination of the revolutionary struggle, seven laws of such a character had been passed during that period, and even after its close, when peace had returned, rigid enactments were made which excluded from the legal profession many eminent lawyers of that generation. A more enlightened and liberal spirit, however, under the guidance of the most able statesmen, and the profound jurists of that day finally prevailed, and those who had been banished from the country were allowed to return, restored to the privileges of citizenship by the repeal of disabling laws, and in one instance, at least, where the party had the misfortune to differ from his neighbors and friends upon the great question of the American independence after years of absence and expatriation in a foreign land, was allowed to resume his former position in the legal profession, when his talents, extensive acquirements and profound learning shed lustre upon the jurisprudence of the State, and the purity and consistency of his life to an advanced age commanded the respect, confidence and veneration of the entire community."

But if the legislature might declare this belief, this teaching, this membership a crime against the well-being of society and punish it with disfranchisement and disqualification to hold office, it cannot make the election officers a proper tribunal to determine the guilt or innocence of the accused, or their adjudication due process of law.

In another case in the same State the court said:

"The inspectors of election are not in a position to adjudicate these matters. They are not authorized to do so. They can determine who are citizens, but they cannot adjudge and declare, as an original adjudication, that the plaintiff's citizenship has been forfeited by the commission of the offence. They could receive as evidence such an adjudication made by another court, and give effect to its provisions by rejecting the vote, and thus deprive the person of the privilege of citizenship, but further than this I do not see that they could go."

Gotcheuss v. Matheson, 58 Barbour, 152.

In Haber v. Reily, 53 Pa. St., 112, Judge Strong, subsequently one of the justices of the Supreme Court of the United States, said:

"I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties can be in any other mode than by trial according to the law of the land or due process of law—that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of election or a board of election officers, constituted under State laws, is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences, according to the meaning of that phrase of the Constitution. There are, it is true, many things which they may determine, such as the age and residence of the person offering to vote, whether he has paid taxes, and whether if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his right, is an inquiry of a different character. Neither our Constitution nor our laws has

conferred upon the judge of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses; and their judgment, if rendered, would be binding upon no other tribunal."

In the case before cited from the New York Court of Appeals, the court further say:

39 N. Y., 422.

In the matter of Dorsey (7 Porter, 293), the Supreme Court of Alabama held that a trial and conviction was necessary before a citizen could be disfranchised.

A statute of Alabama disqualified persons who had engaged in duels, and prescribed a test oath. Mr. J. L. Dorsey, declining to take this oath, was refused admission to the bar, and the case coming up to the Supreme Court of that State was elaborately considered in all its bearings.

In the course of the opinion, the court say:

"The tenth section of the bill of rights, among other things, provides that no one shall be compelled to give evidence against himself, nor shall he be deprived of life, liberty or happiness but by due course of law. After a patient and mature examination of the matter, I am of opinion that the requisition of the expurgatory oath exacted by this law offends against this portion of the bill of rights. It is so offensive to the first principles of justice, to require a man to give evidence against himself in a penal case that, independent of the constitutional interdict, no one in this enlightened age will be found to advocate the principle. But, it may be said, this is not a case of this kind, as no corporal or pecuniary punishment is the consequence of a refusal to take the oath against dueling. But, are not the results the same whether punishment follows from the admissions or is imposed as a consequence of silence? Can ingenuity make a distinction between a punishment inflicted in this mode, as a consequence of the refusal to take the oath, by closing one of the avenues of wealth and fame, and positive pecuniary mulct? If there be a difference, I think it entirely in favor of the latter so far as the amount or weight of the penalty could affect the decision of this question."

The phrase "due process of law" is, as the Supreme Court

has said, equivalent to the other words, "the law of the land," found in Magna Charta; Professor Pomeroy says: "It is plain that any statute which Congress or legislature may see fit to pass, is not, in the sense in which the words are used in the Constitution, 'due process of law,' or 'the law of the land.' Otherwise the safeguard of private rights would become a mere empty form."

And in Porter v. Taylor, 4 Hill, 146, Mr. Justice Bronson, in delivering the opinion of the court, thus defined the phrase:

"The words 'by the law of the land' do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The meaning of the section seems to be that no member of the State shall be deprived of his rights and privileges, unless the matter shall be adjudged against him on trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. The words 'due process of law' cannot mean less than a prosecution or suit according to the prescribed forms and solemnities for ascertaining guilt, or determing the title to property."

Let me quote again from the burning words of Hamilton, and I will weary you a little more. He spoke to avert vengeance from the hated loyalist. Pleading for the constitutional rights of the despised Mormon to-day, we have seen from what I have read from the case of Green v. Shumway, that he went down for a time before a triumphant populace; but the reaction came. On the proposition to disfranchise all who had voluntarily remained within the British lines, he said

"Nothing is more common than for a free people in times of heathen violence to gratify momentary passions by letting into the government, principle and precedence which after prove fatal to themselves. Of this kind is the doctrine of disfranchisement, disqualification and punishments

by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens, at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing passion. The name of liberty applied to such a government would be a mockery of common sense.

Mr. Johnson, in conclusion, said: These are the points I propose to make against this bill. I do not propose to address your honors upon any considerations other than purely legal considerations. You are not responsible for this law no more than I am. You cannot repeal the law, I am fully aware of that, if it is a valid law. But I call upon you here, at the close of this argument, to perform an unpopular duty. I warn you of that, not thinking that it will influence you at all; you are fully cognizant of that, and indeed I feel it myself. But living in this republican government, we, the children of its organizers, have the rights that the fathers of it intended to secure to us. If we have the rights that the author of the Declaration of Independence boasted in, in his old age, sitting down and contemplating a life worthily spent in the service of his fellow men; I say, if he was not mistaken, if his compeers were not mistaken, then it does not lay within the power of any legislature, under and bound by the federal constitution, deriving its power directly from that constitution, to impose disqualifications upon any man on account of his belief. I may say that it is beyond the whole scope and intent of our institutions to question him as to his belief on any subject, religious, political or scientific, or any other belief that the human mind is capable of conceiving; but above all, that no men should ever be brought, as my clients are brought here to-day, to vindicate, before a court of justice, their belief, their conviction, upon a religious subject. I am not speaking

to a Christian court. This court, as a court, can know no difference in religion. Sitting here, clothed with the robes of justice, to administer the laws of the land, the Jew and the Mahomedan stand equally before, and equally protected before this court and before the laws. You may have your prejudices, personally, but as justices you cannot say one religion is better than another. Is it necessary for me to stand before this court and say, as a proposition of law, that this despised Mormon sect have a religion as pure, as logical and as justifiable as that of the most devoted sectarian in any denomination in Christendom? No; because you can know no difference. If that is admitted, if you admit that in your innermost souls, half this battle is won; because there is not a man in the Union that would tolerate this oath if it was intended to exclude his own sect of Christians. If that oath was so framed as to exclude the Seventh Day Baptists; to exclude a man who believed in immersion, or a man who belonged to a sect who believed in immersion, no man would tolerate it for a moment.

Now, they have refused to administer this oath to certain people in this Territory because they belonged to the Mormon church, nothing more and nothing less. If it is not a religious test to exclude them for the most innocent whims, then my argument would not apply. For what are they excluded? For being members of a certain church. They are excluded for belonging to an organization that teaches its members or devotees, for instance, this system of celestial marriage. A sect that believes in celestial marriage does not necessarily believe in anything immoral, anything contrary to civilization, or inimical to good government or the welfare of society. I will not characterize celestial marriage, but that ceremony, whatever it amounts to, may be with the dead. If I religiously believe that I can better the condition of my ancestors who have passed away years ago by entering into celestial marriage, does that render me unfit, as long as I can keep out

of an insane asylum, to exercise the franchise or hold office? You are bound to know that, that this expression in this oath shows that it was a persistent attempt to reach everybody in this sect (Mormon) or denomination. Celestial marriage is a belief. I should call it a superstition; but at any rate it is a belief. There is nothing wrong about it in any sense.

If they can ask a Mormon in regard to his belief, so they can ask a Baptist, who believes in baptism or immersion. Where is the difference in the principle? And as I said before, if this law had undertaken to do that, the whole community would be up in arms. If they had undertaken to do what was undertaken thirty years ago, and which I distinctly remember, to disfranchise those who believed in the temporal power of the Pope and looked to him as the head of the church—if that was undertaken to-day it would create a revolution. But this poor little despised Mormon sect cannot *believe*, however innocently, in this doctrine of celestial marriage. If they entertain such a belief they are to be disfranchised for it. That will never do under our Constitution. If I have a mind to form a belief, as said by Judge Edmunds, even the horrible and outrageous custom that once existed of the rite of the suttee I can do so. I might *believe* in the right of the suttee, still I must not be punished for saying I believed it. But that is what the law says here—that I must be punished for believing it.

Upon the other hand if they cannot compel us to swear that our sect does believe in celestial marriage then we are entitled to vote and to have judgement reversed. This is our appeal. If they can compel us to swear to this oath; if they can punish us for belonging to a certain organization, then, I say, that there is not a sect or denomination of Christians, Pagan or Jew, but that may be disfranchised; and the cunning of man may invent an oath that will cut them out of the body politic. A law declaring the Catholic religion the

only true religion; a law declaring that Jesus Christ is the holy author of our religion, and that it is the only true religion; a law to exclude the Jew who does not recognize our Savior; all of these laws would have just as much justification as this oath has. No such law can be sustained; and if you sustain this oath you strike—unless I have become insane upon this subject, unless a little reading, a little reflection has made me mad—you strike at the foundation of our institutions, and if your judgment should be sustained in the higher court, then the whole guarantees of the Constitution are stricken down to a religious freedom; for I could then, as an attorney, draw up an oath that would apply to any denomination, taking exception to some single doctrine, and that would exclude its members from the polls and if this scheme succeeds such a thing may be attempted. Such is the history of mankind. You give mankind the right to decide that which God Almighty has the right to decide only, give him the right to measure another man's belief by his own—which this law undertakes to do—and he will, as history has proven, abuse that right. If this oath is finally declared constitutional, if you do not hear, your children will of the same thing being applied to other denominations. To-day it is the despised Mormons. By and by it will be the proud Episcopalians, or the Wesleyans, or Presbyterians, or the Baptists; there is no distinction in the principle.